U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28426950

Date: JAN. 18, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner, an executive sous chef, seeks classification under the employment-based, first-preference (EB-1) immigrant visa category as a noncitizen with "extraordinary ability." *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). Noncitizens may obtain U.S. permanent residence in this category if they demonstrate sustained national or international acclaim and, through extensive documentation, recognition of their achievements in their fields of expertise. *Id.*

The Director of the Texas Service Center denied the petition, concluding that the record did not establish the Petitioner met any of the ten evidentiary criteria. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Under section 203(b)(1)(A) of the Act, an individual is eligible for the extraordinary ability classification if: (i) they have extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and their achievements have been recognized in the field through extensive documentation; (ii) they seek to enter the United States to continue work in the area of extraordinary ability; and (iii) their entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner may demonstrate international recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). Absent such an achievement, a petitioner must provide

sufficient qualifying documentation demonstrating that they meet at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

The Petitioner has been an executive sous chef in O-1 nonimmigrant visa status since June 2018; first at the [redacted] in Puerto Rico, and now at the [redacted]. Prior to entering the United States, he was an executive sous chef at [redacted] in South America. He indicates his intention to continue his work in the same field in the United States.

As the Petitioner has not established his receipt of a major, internationally recognized award, he must satisfy at least three of the ten lesser evidentiary criteria found at 8 C.F.R. § 204.5(h)(3)(i)-(x).[1]

The Director evaluated the Petitioner's evidence under three of the ten eligibility criteria: published material about the Petitioner's work in professional or major trade publications or other major media; the Petitioner's performance in a leading or critical role for organizations or establishments that have a distinguished reputation; and high salary or other significantly high remuneration for services in relation to others in the field. The Director denied the petition concluding that he did not meet any of these three criteria.

On appeal, the Petitioner asserts that the Director ignored comparable evidence, failed to consider evidence submitted in support of two additional criteria (receipt of lesser nationally or internationally recognized prizes or awards and commercial success) and did not consider the totality of the evidence. Further, the Petitioner incorrectly contends that because the Director only evaluated three of the five criteria, "we can . . . reasonably conclude that USCIS considered that the Petitioner **had established** by a preponderance of evidence that he meets these two criteria."

We acknowledge that the Petitioner's initial evidence asserted his eligibility under five criteria, including receipt of lesser nationally or international recognized prizes or awards for excellence and commercial success. However, the Director's omission of these two criteria does not warrant a remand of the petition for further consideration because the Petitioner could not meet the minimum three criteria regardless of his asserted eligibility under these two additional criteria. *See, e.g., Clifton v.*

[1] We note the Petitioner appears to withdraw his argument that he meets the criterion for display of his work in the field at culinary exhibitions or showcases, which he brought up for the first time in response to the Director's request for evidence (RFE). An issue not raised on appeal is waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (*citing Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)). Therefore, we consider this criterion waived.

Holder, 598 F.3d 486, 494 (8th Cir. 2010) (*quoting Berte v. Ashcroft*, 396 F.3d 993, 997 (8th Cir. 2005)); *see also Lee v. Holder*, 765 F.3d 851, 855 (8th Cir. 2014); *Vargas v. Holder*, 567 F.3d 387, 391 (8th Cir. 2009) (generally standing for the proposition that remands are not needed if the issue is not likely to change the result). Further, because the Petitioner does not meet the three claimed criteria addressed by the Director and discussed below, it is unnecessary for us to reach a decision on the two additional criteria relating to receipt of lesser nationally or internationally recognized prizes or awards for excellence and commercial success because he cannot numerically meet the required number of three criteria. Therefore, we will reserve these issues. *See INS v. Bagamasbad,* 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach).

A. Evidentiary Criteria[2]

> *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.* 8 C.F.R. § 204.5(h)(3)(ix).

The Petitioner provided his 2022 income tax return and Form W-2 showing an income of $71,085 for his position of executive sous chef, along with the May 2021 occupational employment and wage statistics (OEWS) page for chefs and head cooks showing the annual mean wage for the occupation to be $56,920.[3]

Here, the Petitioner has not sufficiently documented how his salary compares to other hotel executive sous chefs in order for us to evaluate whether his salary is high in relation to others in the field. The 2021 OEWS information comes from data collected on employment and wage rates for occupations across geographical areas. *See* https://www.bls.gov/bls/wages.htm. The Petitioner provided the annual mean wage, which is a benchmark for the typical wages for a chef and head cook position. However, a petitioner claiming to meet this criterion must provide appropriate evidence such as geographical or position-appropriate compensation surveys. *See generally*, 6 *USCIS Policy Manual*, supra, at F.2(B)(l)(criterion 9). Here, the mean salary information is for a 2021 nationwide survey of head cooks and chefs in all settings, both hotels and otherwise, as well as across geographic areas, both major metropolitan areas and those that are not.[4] Without more, such general information is insufficient to establish that he meets this criterion. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen).

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[2] While we do not discuss each piece of evidence in the record individually, we have reviewed and considered each one.

[3] While not a basis for our decision, we note that the same OEWS survey (May 2021) provided by the Petitioner shows that head chefs and cooks in the top 90% of the field (nationwide) earned an annual wage of $84,570. *See* https://www.bls.gov/oes/2021/may/oes351011.htm. Thus, the Petitioner's salary in 2021 ($71,085) is more than $10,000 less than those head chefs and cooks earning the top 90% of wages in the field.

[4] We acknowledge the Petitioner's assertion that he established this criterion because his income ($82,000) at the [redacted] is more than $25,000 higher than the 2021 annual mean wage for chefs nationwide according to U.S. Bureau of Labor Statistics. However, his evidence does not include updated survey information; thus, there is insufficient evidence to support his assertion. *See Matter of Chawathe*, 25 I&N Dec. at 375-76.

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation. 8 C.F.R. § 204.5(h)(3)(iii).

To meet this criterion, the Petitioner submitted numerous articles, social media posts, and still images from his TV appearances. Many of these materials include his photograph, a recipe he provided, and in some publications, a short quote from him. To properly evaluate this evidence, we must first determine whether the published material was related to the Petitioner and his specific work in the field of endeavor. In general, the published material should be about the person, relating to the person's work in the field, and not about the person's employer or another organization that the person is associated with. *See Noroozi v. Napolitano*, 905 F.Supp.2d 535 (2012) (articles about the Iranian Table Tennis Team which only briefly mentioned the person were not about him.); *see also Negro-Plumpe v. Okin*, 2008 WL 106997512 (D. Nevada 2008) (articles focusing on a character played by the person or the show he performed in were not about the person). In addition, published material that includes only a brief citation or passing reference to the person's work is not "about" the person.

The Petitioner's published material is not "about" him within the meaning of 8 C.F.R. § 204.5(h)(3)(iii). For example, he provided ten articles showcasing his recipes in the [redacted] section of the Guatemalan newspaper *El Periodico*, which include his photograph and the business logo for his employer, [redacted] in Guatemala. The Petitioner contends that "published recipes included in the various newspaper and magazine articles are major achievements in the culinary field," but does not provide context for us to understand whether this assertion is true. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (assertions of counsel are not evidence). Regardless, even if it is a major achievement, the Petitioner must still meet the plain language of the regulation.

Similarly, the articles in *National News Guatemala* and *Prensa Libre's* [redacted] section promote the hotel restaurant where he worked. Others, such as *Contrapoder* and *Semana*'s segment [redacted] display his recipes or cover an event that he took part in (i.e., a charity dinner as noted in [redacted]). In the article [redacted] in the culture section of *Metro Libre* in [redacted] 2019, his participation in a Guatemalan food festival, along with two other chefs, is highlighted. The article also contains a short quote from him about the value of using Mayan cooking techniques and ingredients. Other articles discuss the restaurants where he has worked as an executive sous chef, discuss food trends (i.e., sushi and poke bowls, buffets, and pizzerias), special events, and other food offerings in the hotel and tourism industry (i.e., '[redacted]"), and the [redacted] in which the Petitioner participated as an organizer and chef. However, these articles are not about him.

The Petitioner also asserts that he has appeared on major TV channels, such as NTN24, Nuestra TeleNoticias, TV Azteca, and Telemetro. However, the still images of these TV appearances show that the TV coverage was about his employers' restaurants or concern other promotional events taking place at the hotel's restaurants. The still images of these TV segments do not show that they were about him or his work rather than about an event in which he took part. As such, although there is

published documentation that includes the Petitioner's name, his recipes, and his employers, he has not established that this evidence is about him and his work in the field.

As such, the Petitioner has not established his eligibility under 8 C.F.R. § 204.5(h)(3)(iii).

> *Evidence that the person has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. 8 C.F.R. § 204.5(h)(3)(viii)*

To meet the plain language of this criterion, the Petitioner must establish that he not only performed in a leading or critical role for an organization, establishment, or a division or department within an organization or establishment, but also that the organization or establishment, or the division or department, has a distinguished reputation. In other words, whereas here, the Petitioner claims to have performed in a leading or critical role for the restaurant or food and beverage department (FBD) within the hotel(s), he must establish the distinguished reputation of the FBD and not the hotel. *See generally* 6 *USCIS Policy Manual* F.2(B)(1)(Criterion 8). To determine if the role is critical, we look at whether the person has contributed in a way that is of significant importance to the outcome of the organization or establishment's activities or those of a division or department of the organization or establishment. *Id.* A supporting role may be considered critical if the person's performance in the role is (or was) important. *Id.* It is not the title of the person's role, but rather the person's performance in the role that determines whether the role is (or was) critical. *Id.*

The record contains letters of reference and organizational charts to show that while he worked at the [redacted] Puerto Rico, his position was third following the "General Manager," and "Executive Chef and Food and Beverage Manager" and that he supervised the following positions: "Sous Chef," "Jr. Sous Chef," "Banquets Chef," "Restaurant Chef Supervisor," "Banquets Chef Supervisor," and "Cooks Level I-III." The organizational chart for the [redacted] shows him to be in a similar relative position within the hotel's food and beverage department (FBD). The Petitioner's evidence, including the reference letters, establishes that he has performed in a critical role within the restaurants and FBDs of the hotels where he has worked.

While the Petitioner refers to the restaurants where he has worked as "top-rated," he has not shown that any of the FBDs within these hotel chains have a "distinguished reputation." He provided a 2018, 2019, 2020, and 2021 "Recognition" list of awards given to the [redacted] hotel chain by [redacted] among others. However, these lists do not recognize or concern the hotel's restaurants or FBDs, but instead, recognize the [redacted] as a whole.

He also provided printouts of information about the [redacted] showing the amenities (including the restaurants, pools, and rooms) offered to its guests, the [redacted] 2020 Annual Report and Security and Exchange Commission's annual report for 2020, and information about the [redacted], including the hotel's amenities, and an article highlighting the hotel's history in downtown [redacted] Texas. However, this information does not establish the distinguished reputation of any of the hotels' FBDs. Similarly, the letter provided by [redacted] explains that she hired and worked with the Petitioner at the [redacted] and that the FBD is "expected to increase by $2M by the end of 2023, due to the growth of tourism in the city of [redacted]." While we acknowledge her statement concerning the FBD's

projected revenue growth, she does not address the FBD's distinguished reputation, and instead appears to link its growth to tourism and the popularity of [redacted] Texas.

As such, without sufficient evidence to demonstrate the distinguished reputation of any of the restaurants and FBDs where the Petitioner has had a critical role, he has not established this criterion.

B. Comparable Evidence

Under 8 C.F.R. § 204.5(h)(4), a petitioner may submit comparable evidence to establish eligibility, if U.S. Citizenship and Immigration Services (USCIS) determines that the evidentiary criteria described in the regulations do not readily apply to the occupation. *See generally* 6 *USCIS Policy Manual* F.2(B)(3)(Comparable evidence). When evaluating such comparable evidence, USCIS must consider whether the regulatory criteria are readily applicable to the occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation. *Id.* Furthermore, a general unsupported assertion that the listed evidentiary criterion does not readily apply to an occupation is not probative. *Id.* Similarly, general claims that USCIS should accept witness letters as comparable evidence are not persuasive. *Id.* However, a statement from a petitioner can be sufficient to establish whether a criterion is readily applicable if that statement is detailed, specific, and credible. *Id.* Although USCIS does not consider comparable evidence where a particular criterion is readily applicable to the occupation, a criterion need not be entirely inapplicable to the occupation. *Id.* Rather, USCIS considers comparable evidence if the petitioner shows that a criterion is not easily applicable to the person's job or profession. *Id.*

In his initial submission and RFE response, the Petitioner provided letters from individuals familiar with his work to establish his eligibility under several criterion.[5] However, he does not provide any explanation for why USCIS should consider this evidence comparable or why these regulatory criteria do not readily apply to his occupation. Similarly, on appeal, while the Petitioner references "at least 10 exhibits from experts in the culinary world . . . attesting to the extraordinary abilities the petitioner has displayed in this field," and includes excerpts, he does not explain which criteria do not apply to his occupation or how this evidence is comparable to the specific criterion. As such, the Petitioner has not met his burden and we cannot consider these letters as comparable evidence.

C. Final Merits Determination

The Petitioner has not established that he meets at least three of the evidentiary criteria, and thus cannot be classified as an individual of extraordinary ability. Accordingly, we need not provide the type of final merits determination referenced in *Kazarian,* 596 F.3d at 1119-20.

[5] Specifically, he claimed the letters were evidence of the following criteria: evidence of their receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor, 8 C.F.R. § 204.5(h)(3)(i); evidence of the person's original contributions of major significance in the field, 8 C.F.R. § 204.5(h)(3)(v); evidence of the display of the person's work in the field at artistic exhibitions or showcases, 8 C.F.R. § 204.5(h)(3)(vii); and evidence that the person has performed in a leading or critical role for organizations or establishments that have a distinguished reputation, 8 C.F.R. § 204.5(h)(3)(viii).

D. Petitioner's current O-1 nonimmigrant status

In accordance with USCIS policy, because the Petitioner has held O-1 status since 2018, we must explain why, notwithstanding the previous O-1 nonimmigrant visa approval, the Petitioner is not qualified for classification as an immigrant with extraordinary ability at this time. *See* https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2. First, we note that the records of proceeding for the approved O-1 petitions are not before us; thus, we cannot compare the records to determine whether the approved petitions involved different facts or were approved in error. Under our current policy, the Petitioner's receipt of O-1 nonimmigrant classification is relevant and can be considered an indicator that he is eligible for EB-1 classification. However, as discussed above, the evidentiary deficiencies in the record do not support a grant of EB-1 classification. *See Matter of Chawathe*, 25 I&N Dec. at 375-76. As such, his grant of O-1 nonimmigrant visa classification has been considered, but the evidence remains insufficient to meet his burden to establish his eligibility for EB-1 classification.

III. CONCLUSION

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top. *See Matter of Price*, 20 I&N Dec. at 954 (concluding that even major league level athletes do not automatically meet the statutory standards for classification as an individual of "extraordinary ability,"); *Visinscaia*, 4 F. Supp. 3d at 131 (internal quotation marks omitted) (finding that the extraordinary ability designation is "extremely restrictive by design,"); *Hamal v. Dep't of Homeland Sec. (Hamal II)*, No. 19-cv-2534, 2021 WL 2338316, at *5 (D.D.C. June 8, 2021) (determining that EB-1 visas are "reserved for a very small percentage of prospective immigrants"); *see also Hamal v. Dep't of Homeland Sec. (Hamal I)*, No. 19-cv-2534, 2020 WL 2934954, at * 1 (D.D.C. June 3, 2020) (*citing Kazarian*, 596 at 1122 (upholding denial of petition of a published theoretical physicist specializing in non-Einsteinian theories of gravitation) (stating that "[c]ourts have found that even highly accomplished individuals fail to win this designation")).

For the reasons discussed above, the Petitioner has not demonstrated his eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.